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HAROLD B. WILLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 564

ISAAC M. ELLER AND JACK V. ELLER,
Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. KYLE HAYES,
Counsel for Petitioners.

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ISAAC M. ELLER AND JACK V. ELLER,
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vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Isaac M. Eller and Jack V. Eller, respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered December 17, 1953, reversing the judgment of the United States District Court for the Middle District of North Carolina.

The Opinion Below

The Court of Appeals reversed the judgment of the District Court which upheld the petitioners' motion to dismiss

a 20 count indictment charging the violation of 26 USC 2811. (However, in the body of the indictment the same charged violation of the Internal Revenue Code and Regulations thereunder.) The opinion is in the record.

Jurisdiction

The jurisdiction of this court is invoked under the following:

Title 28 USCA 1254 (1).
Supreme Court Rule 38, Sections 1 and 5 (b).

Further jurisdiction is claimed by Title 18 USCA 3731. Since the United States appealed to the Circuit Court rather than to the Supreme Court of the United States the petitioners should be granted the right of a review by the Supreme Court.

Questions Presented

1. Do the petitioners have the right to have the Supreme Court of the United States review the adverse decision of the Circuit Court where the United States has elected to take the case to the Circuit Court, in the first instance, rather than the Supreme Court?
2. Is an indictment under Title 26 USCA 2811 sufficient within itself to bring the petitioners to trial without Regulations 17 to support it?
3. Did Regulations 17 of 1951 supersede Regulations 17 of 1945?
4. Does Regulations 17 of 1951 carry forward a demand letter issued in 1947 under Regulations 17 of 1945?
5. Did Congress by giving to the Secretary of the Treasury the authority to issue regulations intend to give the court authority to punish defendants for the violation thereof in excess of $500.00 fine and imprisonment for one year?

Statutes Involved

Title 26 USCA 2811.

Treasury Regulations 17 approved April 4, 1951 (26 CFR, Part 173; 13 F. R. 5929).

Treasury Regulations 17, 1945 Edition (26 CFR, Part 173; 10 F. R. 8734).

Title 18 USCA 3731.

Summary Statement

Petitioners seek review of the judgment of the United States Court of Appeals construing Title 26 USCA 2811 and Treasury Regulations 17, approved April 4, 1951, and Treasury Regulations 17 of 1945. The Circuit Court of Appeals reversed the District Court, which court had signed an order dismissing a 20 count indictment against the defendants. The District Court held that Regulations 17 of April, 1951, superseded and took the place of the prior Regulations 17 of the Treasury Department of 1945, and that a demand letter issued under the old regulations in 1947 was of no effect and did not constitute a demand on the defendants to report sales of sugar after the 1951 Regulations went into effect. The lower court construed Section 4 of the 1951 Regulations as a savings clause, which would enable the United States to prosecute for offenses committed under the old regulation after its repeal. The Circuit Court held that the demand letter issued under the superseded regulation was still in force and that the savings clause hereinafter set out related to acts done by the Commissioner and reversed the District Court and remanded the case ordering the defendants to answer to the indictment. Section 4 of the Regulations 17 of 1951 reads as follows:

> "4. These regulations shall not affect or limit any act done or any liability incurred under any regulations

superseded hereby, or any suit, action, or proceeding had or commenced in any civil, administrative, or criminal cause and proceeding prior to the effective date of these regulations, nor shall these regulations release, acquit, affect, or limit any offense committed in violation of previously existing regulations, or any penalty, liability or forfeiture incurred prior to such date."

The petitioners in apt time filed with the Court of Appeals a petition for re-hearing. The same was denied on January 4, 1954, and from the opinion and the denial of the petition for re-hearing these petitioners seek this writ to review the action of the Circuit Court of Appeals.

Reasons for Issuance of Writ

1. That the cause involved presents a grave question of vital importance to the public because of the multitudinous regulations issued by the Secretary of the Treasury and other Departments of the United States Government, whereby practically every citizen is affected thereby, and it ought to be determined whether Congress intended that the violation of a regulation could be broken down into a large number of counts at the election of the United States, or of the District Attorney, thus subjecting the citizen, if convicted therefor, to punishment which would result in imprisonment for the term of his active life (in this case 20 years) or whether Congress intended that the violation of a Regulation should be a maximum punishment of one year imprisonment and a fine of $500.00.

2. A second cause of grave importance to the public and that ought to be determined in this case is whether the United States can appeal to the Circuit Court of Appeals from the adverse ruling of the District Court and obtain a favorable ruling from the Circuit Court of Appeals, thereby

depriving the defendant of the right to have his case reviewed by this Court on his petition.

3. As a third ground the case at bar conflicts with the holdings of this Court in the case of *United States* v. *Carroll,* 345 U. S. 457, and conflicts with the holdings of the 7th Circuit in the case of *United States* v. *Mustari,* 109 Fed. 2nd 438, in principle.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents to the Court the question as to whether the United States can present a bill of indictment containing as many counts as it elects to present for the violation of a regulation, the punishment therefor under the statute being a maximum of one year in prison and a fine of $500.00, and by its action in so doing multiply the punishment for the violation of a regulation by the number of counts in the indictment. If convicted in this case the possible punishment could be 20 years imprisonment and a fine of $10,000.00 for each defendant. The petitioners respectfully contend that Congress never intended such drastic punishment for violation of Title 26 USCA 2811, and the regulations issued thereunder, or for the violation of any other regulations. Citing *United States* v. *Carroll*, 345 U. S. 457, 73 Sup. Ct. Rep. 757, Justice Douglas delivering the opinion says:

> "We hesitate to conclude that a failure to file an unverified schedule is given the same dignity as the failure to file the verified return. We are dealing with criminal sanctions in the complicated, technical field of the revenue law. The code and the regulations must be construed in light of the purpose to locate and check upon recipients of income and the amounts they receive. See S. Rep. No. 103, 65th Cong., 1st Sess. 20. But at the same time every citizen is entitled to fair warning of the traps which the criminal law lays. Where the "return" prescribed is a verified Form 1096 together with all the unverified Forms 1099 it does not seem fair warning to charge a person for more than the failure to make that return.* *To multiply the crimes by the number of Forms 1099 required to be filed is to revise the regulatory scheme.* So far as these information returns are concerned, the purpose of § 145(a) seems

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* Italics ours.

to us to be fulfilled when the sanction is applied only to a failure to file Form 1096."

In the case at bar the District Judge had for construction on a 20 count indictment against the petitioners Treasury Regulations 17, approved April 4, 1951. The pertinent parts thereof being as follows:

"Preamble. 1. These regulations, 'Regulations 17. Disposition of Substances Used in the Manufacture of Distilled Spirits' (26 CFR, Part 173) are a republication of Regulations 17, 1945 Edition (26 CFR, Part 173; 10 F. R. 8734) and all amendments and modifications thereof through December 31, 1950.

"2. These regulations consist only of previously approved material but the text has been rearranged and renumbered to conform to the Federal Register Regulations (13 F. R. 5929).

"3. * *These regulations shall, on and after April 1, 1951, supersede Regulations 17 (26 CFR, Part 173; 10 F. R. 8734).*

"4. These regulations shall not affect or limit any act done or any liability incurred under any regulations superseded hereby, or any suit, action, or proceeding had or commenced in any civil, administrative, or criminal cause and proceeding prior to the effective date of these regulations, nor shall these regulations release, acquit, affect, or limit any offense committed in violation of previously existing regulations, or any penalty, liability or forfeiture incurred prior to such date.

"5. It is found that compliance with the notice and public rule-making procedure and effective date limitations of the Administrative Procedure Act (5 U. S. C. 1001 et seq.) is unnecessary in connection with the issuance of the regulations in this part for the reason that the changes made are of a technical and clarifying nature and do not adversely affect the legitimate industry."

* Italics ours.

The District Court also had for construction Title 26 USCA 2811. The District Court dismissed the indictment against the defendants, construing section 3 of the Regulations as being the regulation in force on and after April 1, 1951.

In September, 1947 these defendants were served with a demand letter under the 1945 Regulations 17 above referred to. The District Court construed section 4 of the new regulations to be a savings clause purposely inserted therein by the Secretary to preserve only the right of the United States to punish for offenses committed under the old act or regulations.

The District Court held that a demand letter issued under the 1945 regulations expired with the regulations. The Circuit Court held that the demand letter under the old 1945 regulations was still in existence and that paragraph four of the regulations of 1951 applied to acts done by the Commissioner, taking the wording entirely out of its context and construing it in favor of the United States.

Conflict in the Circuits:

A conflict exists between the holdings of the 7th Circuit and the instant case. This case conflicts with the holdings of the 7th Circuit in the case of *United States* vs. *Mustari,* 109 F. 2nd 438. The 7th Circuit holds in the Mustari case that the demand letter is an indispensable condition precedent to a criminal prosecution. The Fourth Circuit's holding in this case is in effect that the demand letter is not important and that an old letter issued in 1947 under the 1945 Regulation, which Regulation was superseded by the regulation of April 1, 1951, was revived and brought forward into the new regulation without a word being said by the Secretary of the Treasury, or the Com-

missioner, incorporating the demand letter issued under the old regulation into the new.

It will be noted that paragraph four of the new regulation is devoted entirely to preserving the power in the United States to prosecute for offenses committed under the old regulation, while nothing whatever is said in the new regulation about preserving the demand letter issued under the old. The United States concedes that no demand letter was issued under the regulation in force at the time the alleged offenses were committed and charged in the indictment.

The MUSTARI case cited above holds that the statute is not self executing, and we quote:

> "The statute is not self-executing in respect to the imposition of penalties for the violation of the act by failure to make required returns. It is only when the Commissioner has adopted regulations in conformity with the act and has issued notice to dealers to furnish returns that the dealers have any duty under the act to make returns. Since the penalties imposed are criminal penalties, and since there is no language which expressly requires dealers to make returns for dispositions which are made prior to the demand for returns, the language should not be given a retrospective effect to include such past dispositions. If the act had imposed the duty to make returns without conditioning that duty upon a formal regulation and requirement by the Commissioner, we think it is clear that language identical with the language in question would be construed to require reports only of such dispositions as should be made after the act became effective. Since under the provisions of the section the act does not become effective as against dealers until the Commissioner has indicated that they are required to make a return, we think the proper construction of the language must be that the dealers shall render returns on all dispositions made after demand by the Commissioner."

The Commissioner nor the Secretary inserted in the new regulation a single word about preserving the demand letter in the new regulation which was provided for in the old, but they did insert and provide for punishment for offenses which were committed under the old after the new regulation went into effect.

It is apparent by the absence of any wording in the new regulation about preserving the demand letter issued under the old in the new that it was not the intent of the Secretary nor the Commissioner to so preserve the demand letter in the new regulation, but that a new demand letter should be issued and served on the dealer under the new regulation before he is required to make any report of sales of sugar.

The Commissioner did not insert in the new regulation any wording preserving the old demand letter, and the Circuit Court ought not to insert it now for the Commissioner. Citizens should not be made criminals unless there is a specific statute or regulation making the violation criminal and laying down what shall constitute the offense in plain and decisive language.

The 4th Circuit in the instant case undertakes to construe section 4 of the regulation as having some relation to the demand letter, notwithstanding section 4 is a mere repetition of the conventional form preserving the right of the United States to sue or prosecute under an old statute or regulation that has been repealed or superseded. The mold by which it is determined whether a crime is committed is laid down in the regulations effective April 1, 1951. It prescribes what is to be done to make an offense under it (That is demand in writing). The offenses charged in the indictment all occurred after the effective date of the new regulation. It was clearly the intent of the Commissioner that there should be no crime committed under the

new regulation until a demand letter had been served on the defendants to report. Congress gave the Commissioner the power to make the regulation with the approval of the Secretary of the Treasury. It did not give the Circuit Court the power to make the regulation.

The Circuit Court in this case treated the demand letter as a mere fiction being carried forward without any specific wording to that effect and under the holding of the Circuit Court in this case the demand letter could never cease to have effect until withdrawn by the Commissioner, although the regulation under which it was issued was nonexistent on and after April 1, 1951. While the 7th Circuit held that the demand letter was one of the essential elements to constitute the offense.

None of the other cases cited by the Circuit Court in the Opinion touched on the points raised by the appeal in this case.

It will be noted that Title 18 USCA 3731 gives the United States the right to appeal to the Supreme Court from an adverse ruling in such cases as this and the Supreme Court can then remand the case to the Circuit Court of Appeals, or the Circuit Court of Appeals may certify the same to the Supreme Court. It seems to follow that the petitioners would have the right to have the same reviewed by the Supreme Court if an adverse ruling is had against them in the Circuit Court of Appeals, so that it may be determined by the highest court of the land whether or not they should answer to the indictment.

This case involves the construction of Regulations and whether Regulations 17 of April 1, 1951, repealed Regulations 17 of 1945, and the construction of the wording of the Regulations of April, 1951. Also the relation of regulations to the statutes under which they are promulgated. Therefore, since regulations have become so familiar to our law and affect such a large number of people and the ques-

tions raised are of such importance to the public, this Court should review the decision of the Circuit Court in reversing the District Court.

The petitioners respectfully contend that because of the large number of regulations promulgated by the Secretary of the Treasury affecting the lives of so many citizens of the United States that this Court should grant the petition for a writ of certiorari and review the opinion in this case.

Respectfully submitted, this 27th day of January, 1954.

RAYMOND KYLE HAYES,
Counsel for Petitioners.

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

26 USC 2811

UNITED STATES OF AMERICA

v.

ISAAC M. ELLER, JACK V. ELLER

INDICTMENT—Filed April 20th, 1953

The grand jury charges:

1. That during the period from September, 1947, through March, 1953, Isaac M. Eller and Jack V. Eller, t/a Eller Brothers Wholesale Grocery, were, at North Wilkesboro, in the Middle District of North Carolina, engaged in the business of selling or otherwise disposing of substances of the character used in the manufacture of distilled spirits, more particularly sugar; that on the 29th day of September, 1947, they were served with notice in writing duly issued under authority of the Internal Revenue Code and regulations thereunder to make correct weekly returns in writing showing disposition of sugar in quantities of 200 pounds or more, and of other substances as set out in said notice;

2. That in September, 1951, the exact dates of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 71,000 pounds of sugar, and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Second Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in October, 1951, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 90,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Third Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in November, 1951, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 90,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Fourth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in December, 1951, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 118,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Fifth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in January, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 89,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Sixth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in February, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 63,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Seventh Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in March, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 67,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of two hundred pounds or more as they were required to do.

Eighth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in April, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 24,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of two hundred pounds or more as they were required to do.

Ninth Count

1. The grand jury realleges all the allegations of the first count in this indctment except those contained in the last paragraph thereof, and further charges:

2. That in May, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 80,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Tenth Count

1. The grand jury realleges all the allegations of the count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in June, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 82,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Eleventh Count

1. The grand jury reaalleges all the allegations of the first count in this indctment except those contained in the last paragraph thereof, and further charges:

2. That in July, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 175,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Twelfth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in August, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 99,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Thirteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in September, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 167,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Fourteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in October, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 203,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Fifteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in November, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 111,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Sixteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in December, 1952, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 229,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Seventeenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in January, 1953, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 203,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Eighteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in February, 1953, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 152,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Nineteenth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That in March, 1953, the exact date of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 66,000 pounds of sugar and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Twentieth Count

1. The grand jury realleges all the allegations of the first count in this indictment except those contained in the last paragraph thereof, and further charges:

2. That between July 2, 1951 and February 10, 1953, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made twenty-seven sales of sugar in quantities of 200 pounds or more in each sale and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of such sales as they were required to do.

A True Bill.

J. T. AUSTIN,
Foreman.

BRYCE R. HOLT,
United States Attorney.

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In the Supreme Court of the United States

October Term, 1953

No. 564

ISAAC M. ELLER and JACK V. ELLER, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 22-26) is reported at 208 F. 2d 716. The opinions of the District Court granting a motion to dismiss the indictment appear at pages 11-18 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered December 17, 1953 (R. 26-27). The petition

for rehearing was denied on January 4, 1954 (R. 33). The petition for a writ of certiorari was filed February 1, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a demand, issued under 26 U.S.C. 2811, to file certain information returns contained in a letter dated September 1947 became ineffective when the Commissioner of Internal Revenue in 1951 republished the regulations prescribing the form and manner of such returns.

2. Whether petitioners may, at this time, properly question the legality of the indictment on the ground that it pleaded as separate offenses under 26 U. S. C. 2811 their failure to file during each particular month weekly returns covering the sales made during that month.

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statute and regulations involved read as follows:

26 U.S.C. 2811 (Section 2811, I.R.C.):

> Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Commissioner, render a correct return in such form and manner as the Commissioner, with the approval of the Secretary, may by rules

and regulations prescribe, showing the names and addresses of the persons to whom such disposition was made, with such details, as to the quantity so disposed of or other information, which the Commissioner may require as to each such disposition, as will enable the Commissioner to determine whether all taxes due with respect to any distilled spirits manufactured from such substances have been paid. Any person who willfully violates any provision hereof, or of any such rules or regulations, and any officer, director, or agent of any such person who knowingly participates in such violation, shall upon conviction be fined not more than $500 or be imprisoned for not more than one year, or both. * * *

The Preamble to Regulations 17 (16 F. R. 3111, April 10, 1951):

1. These regulations, "Regulations 17, Disposition of Substances Used in the Manufacture of Distilled Spirits" (26 CFR, Part 173) are a republication of Regulations 17, 1945 Edition (26 CFR, Part 173; 10 F. R. 8734) and all amendments and modifications thereof through December 31, 1950.

2. These regulations consist only of previously approved material but the text has been rearranged and renumbered to conform to the Federal Register Regulations (13 F. R. 5929).

3. These regulations shall, on and after April 1, 1951, supersede Regulations 17 (26 CFR, Part 173; 10 F. R. 8734).

4. These regulations shall not affect or limit any act done or any liability incurred under any regulations superseded hereby, or any suit, action, or proceeding had or commenced in any civil, administrative, or criminal cause and proceeding prior to the effective date of these regulations, nor shall these regulations release, acquit, affect, or limit any offense committed in violation of previously existing regulations, or any penalty, liability or forfeiture incurred prior to such date.

5. It is found that compliance with the notice and public rule-making procedure and effective date limitations of the Administrative Procedure Act (5 U.S.C. 1001 et seq.) is unnecessary in connection with the issuance of the regulations in this part for the reason that the changes made are of a technical and clarifying nature and do not adversely affect the legitimate industry.

STATEMENT

By letter dated September 22, 1947, from the Alcohol Tax Unit, Internal Revenue Service, Treasury Department, demand was made on petitioners as provided by section 2811 of the Internal Revenue Code (26 U.S.C. 2811) to file weekly informa-

tions returns showing the disposition *inter alia,* of sales of sugar of 200 pounds or more (R. 1-3). The letter provided in pertinent part as follows (R. 1-3):

> By virtue of authority imposed upon me pursuant to Section 3170 of the Internal Revenue Code (Title 26, U.S. Code), formal demand is hereby made, in accordance with the provisions of Section 2811 of the Internal Revenue Code (Title 26, U.S. Code) and Regulations 17, issued pursuant thereto, that you file with me correct returns in writing showing each disposition by you to each customer on each day, whether by sale, consignment, delivery or otherwise, and each loss by fire, theft, spoilage, destruction, or otherwise, of the following named substances in the quantities specified:
>
> 200 lbs. or more, Sugar—all kinds.
>
> * * * * *
>
> Beginning with the disposition of the first day after you receive this notice, a return for each business week must be mailed or delivered to me at the address indicated below, not later than the next succeeding business day. These returns must contain, with respect to each disposition, all the information required by Regulations 17.
>
> * * * * *
>
> The requirements set forth in this letter shall remain in force and effect until you are

officially notified in writing of their amendment or withdrawal or until the effective date of any demand letter subsequently served upon you.

Any violation of the provisions of Section 2811 of the Internal Revenue Code or Regulations 17 is punishable by a fine or [sic] not more than $500 or imprisonment for not more than one year, or both.

* * * *

For your information there is enclosed a copy of Regulations 17, approved July 11, 1945, issued under authority of Section 2811 of the Internal Revenue Code. There are also enclosed blank forms to be used for returns.

* * * *

Subsequent to the issuance of this demand letter, in April 1951, Regulations 17 (26 C.F.R. [1949 ed.] part 173) were republished (26 C.F.R. [1952 Supp.] part 173, 16 F.R. 311, April 10, 1951) merely for the purpose of conforming the section numbers to the new pattern of the Federal Code of Regulations. Except for changes which dealt only with the formal parts of the regulations, as distinguished from substantive parts, and except for the renumbering of the sections, the regulations in their reissued form were identical with those which had been issued in 1945 (10 F. R. 8734, July 14, 1945). (Gov. Ex. No.'s 1 and 2, R. 11.) No further demand letter was sent to petitioners.

Petitioners filed some of the required returns after April 1951, but failed to file most of the required returns after that date, although Treasury investigators warned them in person in July 1951 and five times thereafter that the demand letter issued in 1947 was still in effect and called their attention to the fact that they were not filing the required returns (R. 7-8). The Treasury at no time specifically withdrew or cancelled its demand contained in the 1947 letter.

On April 20, 1953, a twenty-count indictment was returned against petitioners (Pet. Ex. "A," pp. 13-20). It charged in count one as follows (*id.*, p. 13):

> 1. That during the period from September, 1947, through March, 1953, Isaac M. Eller and Jack V. Eller, t/a Eller Brothers Wholesale Grocery, were, at North Wilkesboro, in the Middle District of North Carolina, engaged in the business of selling or otherwise disposing of substances of the character used in the manufacture of distilled spirits, more particularly sugar; that on the 29th day of September, 1947, they were served with notice in writing duly issued under authority of the Internal Revenue Code and regulations thereunder to make correct weekly returns in writing showing disposition of sugar in quantities of 200 pounds or more, and of other substances as set out in said notice;

> 2. That in September, 1951, the exact dates of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 71,000 pounds of sugar, and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Counts two through nineteen covered each of the succeeding eighteen months ending with March 1953, and were identical except for the quantity of sugar involved and the specification of the month during which such sales were made (*id.* pp. 14-19). The twentieth count alleged that (*id.* p. 20):

> That between July 2, 1951 and February 10, 1953, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made twenty-seven sales of sugar in quantities of 200 pounds or more in each sale and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of such sales as they were required to do.

Prior to trial, petitioners moved for a dismissal of the indictment on the ground that a written demand which was a prerequisite to the requirement

of filing of the returns was not made on petitioners on or after April, 1951, the date of the republication of Regulations 17 and the date subsequent to which the indictment alleges petitioners' failure to file returns (R. 19-20). They contended, in effect, that the 1947 demand letter became ineffective when Regulations 17 were reissued and that a new demand letter was necessary under the reissued regulations before petitioners could be required to file returns of sugar sales after their reissuance. The District Court sustained this contention and dismissed the indictment (R. 16-18).

On appeal, the Court of Appeals reversed the judgment which dismissed the indictment and remanded the case to the District Court with directions that petitioners be required to answer the charges contained in the indictment (R. 26-27).[1] It pointed out that the requirement for filing a return on demand was contained in the statute and that only the form and manner was left to the regulations; that the republished regulations specifically provided that they should not affect or limit any act done under the prior regulations, and that the 1947 demand letter was "an act done," unaffected by the renumbered regulations (R. 25).

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[1] The appeal was taken to the Court of Appeals since the construction of regulations rather than a statute was involved. See 18 U.S.C. 3731.

ARGUMENT

1. Petitioner's argument that the 1947 demand ceased to be effective when Regulations 17 were reissued in April 1951, is based on the erroneous assumption that the duty to file returns upon demand from the Commissioner stems, not from Section 2811, but from regulations issued thereunder. Such is not the case. Section 2811 specifically provides that "Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Commissioner, render a correct return." While the statute further provides that the return shall be rendered "in such form and manner as the Commissioner, with the approval of the Secretary, may by rules and regulations prescribe," the "form and manner" are merely details implementing the basic duty to file returns. They are not the essential elements of the offense. *United States* v. *Goldsmith,* 91 F. 2d 983, 985-986 (C.A. 2), certiorari denied, 302 U.S. 718; *United States* v. *Turner Bros.,* 11 F. Supp. 908 (E.D. N.Y.). See *United States* v. *Signore,* 115 F. 2d 669 (C.A. 7); *United States* v. *Mustari,* 109 F. 2d 438, 440 (C.A. 7).[2] Accordingly, the reissuance of Regulations 17 in April 1951, could not have af-

[2] Since the court below recognized that a valid demand by the Commissioner was a condition precedent to the duty to report there is not, as petitioner claims, a conflict with the *Mustari* ruling that such demand is necessary.

fected petitioners' duty to file returns as demanded by the Commissioner in 1947 regardless of whether the 1951 regulations "superseded" those approved in 1945 or were merely a continuation in another form of the same regulations. The "form and manner", was the same under the 1945 regulations and the 1951 reissuance thereof.

Petitioners urge (Pet. 10) that the courts by judicial decree should not insert into the regulations a provision that the effectiveness of demand letters issued when the 1945 regulations were on the books survived the reissue of such regulations in 1951, where the Commissioner omitted to include such a specific provision in the reissued regulations. We submit that the Commissioner of Internal Revenue did just that in section 4 of the preamble to the reissued regulations which provides that these "regulations shall not affect or limit any act done or any liability under any regulations superseded hereby", *supra,* p. 4. Petitioners argue that section 4 was intended to preserve only the government's right of prosecution against those who had already violated section 2811, and that the phrase "any act done" refers only to an act done by such a person and does not refer to an act done by the Commissioner of Internal Revenue. Not only does this argument add qualifying limiting language to this part of the regulations which is not there, but it ignores its plain meaning. Furthermore, if this part of sec-

tion 4 was intended to be limited in the manner contended for by petitioners, there would be no purpose in the remainder of the regulations which preserved in clear language the government's right of prosecution. Accordingly, as the court below held (R. 25), the phrase "any act done" covers any act done by the Commissioner such as the issuance of the demand letter.

2. Petitioners cannot raise now their contention (Pet. 4, 6) that the indictment improperly pleaded as separate offenses failure to file the returns each month. Petitioners themselves recognize that their contention is premature for they support their contention by the argument that the punishment under the indictment as pleaded could be excessive under section 2811, since "if convicted in this case the possible punishment could be 20 years imprisonment and a fine of $10,000.00 for each defendant" (Pet. 6). Obviously, this question can be settled only after trial and sentence. It is hypothetical at this point and may not even come up after trial, depending on the outcome of the trial and depending on the sentences to be imposed if there should be verdicts of guilty.

CONCLUSION

The decision below is correct and presents no conflict of decisions or questions of large importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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